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Nos. 06-173 and 06-333

# In the Supreme Court of the United States

SAN CARLOS APACHE TRIBE, PETITIONER

*v.*

STATE OF ARIZONA, ET AL.

PHELPS DODGE CORPORATION,
CONDITIONAL CROSS-PETITIONER

*v.*

SAN CARLOS APACHE TRIBE, ET AL.

*ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

In a general stream adjudication, the Arizona Supreme Court held that the San Carlos Apache Tribe and the United States on the Tribe's behalf are precluded, under res judicata, from asserting rights to the Gila River mainstem beyond those awarded in the 1935 Globe Equity Decree, but that the Decree does not likewise preclude claims to Gila River tributaries. The court also held that the Tribe may not assert, in the state-court general adjudication, a defense to res judicata based on the United States' alleged inadequate representation of the Tribe in the Globe Equity proceedings, because any collateral challenge to the Decree must be brought in the federal court that entered the Decree.

The question presented in the Tribe's petition in No. 06-173 is whether the Arizona Supreme Court erred in declining to hear, on comity grounds, the Tribe's res judicata defense.

The question presented in the conditional cross-petition in No. 06-333 is whether the Arizona Supreme Court erred in holding that the Globe Equity Decree is limited to claims on the Gila River mainstem, as opposed to its tributaries.

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# In the Supreme Court of the United States

No. 06-173

SAN CARLOS APACHE TRIBE, PETITIONER

*v.*

STATE OF ARIZONA, ET AL.

No. 06-333

PHELPS DODGE CORPORATION,
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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. 1a-53a) is reported at 127 P.3d 882. The Arizona Supreme Court's order denying reconsideration (Pet. App. 54a-61a) is reported at 134 P.3d 375.

## JURISDICTION

The opinion of the Arizona Supreme Court was entered on February 9, 2006. The Arizona Supreme Court

denied reconsideration on May 3, 2006 (Pet. App. 54a-61a). A petition for a writ of certiorari was filed on August 1, 2006. A conditional cross-petition for a writ of certiorari was filed on September 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

## STATEMENT

1. The Gila River originates in the mountains of New Mexico and flows west across Arizona, eventually meeting the Colorado River (when flows are sufficient) at the Arizona-California border. The most significant project on the river is the San Carlos Federal Irrigation Project, which includes the Coolidge Dam and San Carlos Reservoir, a massive reservoir designed to store flood waters for downstream irrigation. See generally *Gila River Pima-Maricopa Indian Cmty.* v. *United States*, 684 F.2d 852, 859 (Ct. Cl. 1982). The United States constructed the Coolidge Dam and San Carlos Reservoir on land within the San Carlos Apache Reservation. See generally S. Rep. No. 133, 102d Cong., 1st Sess. 5 (1991).

In October 1925, the United States filed an action in federal district court in Globe, Arizona (styled "Globe Equity No. 59") to secure water rights for the project and associated Indian reservations. See OSM No. 293.[1] The United States asserted various rights on behalf of the Indians of the Gila River Indian Reservation, *id.* at 4-6, the Indians of the San Carlos Apache Reservation, *id.* at 6-7, and non-Indian owners of relevant lands, *id.* at 7-19. The United States named as defendants the Gila Valley Irrigation District and numerous canal companies and individuals with claims to the "Gila River and

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[1] The parties filed thousands of documents with the Office of the Special Master (OSM). See Pet. App. 113a. Each document was assigned an "OSM No." See *id.* at 117a n.6.

its tributaries in the District of Arizona and in the District of New Mexico." *Id.* at 3-4, 21-22.

The United States asserted that it "reserved and appropriated" and was "entitled to use * * * for said San Carlos irrigation project and * * * on said Indian Reservations * * * all of the waters of the said Gila River and its tributaries." OSM No. 293, at 21. With respect to petitioner, the San Carlos Apache Tribe, the complaint stated that the Tribe had appropriated "waters of the Gila River and its tributary * * * the San Carlos river." *Id.* at 6-7. The United States prayed, *inter alia*, for a "decree determin[ing] the relative rights of the parties hereto * * * to and of the waters of the said Gila River and its tributaries." *Id.* at 23.

In 1927, the United States filed an amended complaint narrowing the scope of the adjudication. See OSM No. 346. The United States no longer asserted claims to the "Gila River and its tributaries," OSM No. 293, at 3-4, but instead asserted claims "in the waters of the Gila River" alone. OSM No. 346, at 31. And while the original complaint asserted the United States' rights against a class of defendants with claims to the Gila River or its tributaries, the amended complaint asserted the United States' rights against a class of defendants with claims to "the Gila River" alone, between various points. *Id.* at 32-33.

In amending its claims on behalf of the Apache Indians, the United States likewise withdrew claims to tributaries. The amended complaint asserted that the Apaches were entitled "to sufficient water for the irrigation of the lands deemed necessary for them to irrigate from the Gila river, excluding the San Carlos River." OSM No. 346, at 21; see *id.* at 21-22.

The parties to Globe Equity No. 59 entered into a consent decree (the Globe Equity Decree) in 1935. Pet. App. Supp. 103-225; see OSM No. 4. The Decree recognizes the dismissal, "without prejudice," of numerous parties determined to have "claims and rights, if any, * * * outside the scope of [the adjudication] as outlined and defined in the amended complaint." Pet. App. Supp. 121; see OSM No. 4, at 9. Among the parties so dismissed without prejudice was conditional cross-petitioner Phelps Dodge. *Ibid.*; see OSM No. 469.

As among parties not dismissed, the Decree contains a schedule of rights and priorities. Pet. Supp. App. 124-198. Among other things, the Decree grants the United States the right to divert, from the Gila River, 210,000 acre feet per year to irrigate up to 35,000 acres of "irrigable Indian allotments" on the Gila River Indian Reservation. The Decree also established the United States' right "to store the waters of the Gila River in the San Carlos Reservoir" for the reclamation of approximately 100,000 acres of land below the reservoir. *Id.* at 210, 217.

With respect to the Apache Indians, the Decree established the United States' right to divert 6000 acre feet per year from the Gila River for the "reclamation and irrigation" of 1000 acres of irrigable land. Pet. Supp. App. 198. The Decree concludes by stating that the parties are "forever enjoined and restrained from asserting or claiming" against each other "any right, title or interest in or to the waters of the Gila River" except the rights specified in the Decree. *Id.* at 225.

2. In the mid-1970s, various water-rights claimants filed actions in Arizona state court to resolve conflicting claims. See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 557-558 (1983). Those proceedings evolved

into the present general stream adjudication to determine all rights in the Gila River system. *Ibid.* The United States was joined as a defendant under the McCarran Amendment, 43 U.S.C. 666. The United States filed numerous claims on its own behalf and on behalf of Indians on federal reservations. On behalf of petitioner, the United States asserted rights to divert water from the Gila River, the San Carlos River, and various other waters. Pet. Supp. App. 82, 88-90. Petitioner separately filed similar claims on its own behalf. *Id.* at 42, 47-49.[2]

Before filing claims in the state-court general adjudication, petitioner and other Indian Tribes filed suit in federal district court, seeking removal of the Indian water claims to federal district court and an independent determination of their claims in federal court. *San Carlos,* 463 U.S. at 558. In 1983, this Court held that, in deference to Arizona's general stream adjudication, the federal courts should abstain from adjudicating water rights covered by the state-court adjudication. See *id.* at 569-570. On remand, the Ninth Circuit stayed the federal-court actions brought by petitioner and other Tribes. *Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187, 1189 (1983).

In 1990, petitioner intervened in the federal-court Globe Equity proceedings, in which the court that entered the consent decree in 1935 continues to interpret and enforce the Decree. Pet. App. 44a, 46a. In doing so, petitioner noted that it did not "seek to litigate rights to additional Gila River water in this matter." *Id.* at 44a.

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[2] In asserting rights to the Gila River mainstem, the United States acknowledged that such claims were subject to a ruling on the preclusive effect of the Globe Equity Decree. See Pet. Supp. App. 82; Statement of Claimant No. 39-64,259.

In 1995, the Arizona legislature requested that the state-court Gila River litigation grant early consideration to claims associated with Indian reservations and other federal lands, in order to reduce the cost and complexity of the adjudication. See H.B. 2276, 42d Legis., 1st Sess. § 24(C) (Ariz. 1995). In accord with that request, the trial court directed interested parties to file summary judgment motions, as appropriate, raising preclusion arguments concerning Indian claims. See Pet. App. 112a-115a.

A special master determined that the Globe Equity Decree should be accorded preclusive effect as to claims asserted by or on behalf of the Gila River Indian Community, but that the Decree was limited in scope to the Gila River mainstem, not its tributaries. Pet. App. 145a-147a, 160a-164a, 179a. The trial court affirmed, *id.* at 90a, and held that its preclusion ruling applied to petitioner to the same extent that it applied to the Gila River Indian Community, *id.* at 64a.

3. On interlocutory appeal, the Arizona Supreme Court affirmed the determinations discussed above. Pet. App. 1a-53a. The court noted that res judicata generally prevents re-litigation of the same cause of action, and it assumed without deciding that whether two claims are part of the same cause of action turns on whether they comprise part of the same transaction. *Id.* at 13a-15a. Under that test, the court observed, "claims to the Gila River mainstem asserted by the United States in the Globe Equity litigation would not seem to be part of the same 'transaction' as its claim to the tributaries," in part because the mainstem and tributaries are "spatially distinct." *Id.* at 15a.

The Arizona Supreme Court rested its decision, however, on the different ground that "parties to a consent

decree can agree to limit the decree's preclusive effects" by agreeing "in terms or in effect" to that outcome. Pet. App. 16a (quoting Restatement (Second) of Judgments § 26(1)(a) (1982) (Restatement)). The court concluded that the parties to the Globe Equity Decree so agreed because the Decree "adjudicated only claims to the Gila River mainstem and not to its tributaries." *Id.* at 26a. As support, the court explained that the United States' amended complaint omitted the claims that its original complaint had asserted to the tributaries; the United States dismissed without prejudice all defendants who claimed water solely from the tributaries; and the Decree itself grants rights only as to the Gila River, not the tributaries. *Id.* at 19a-23a.

The Arizona Supreme Court declined, however, to address petitioner's argument that it was not bound by the Globe Equity Decree at all because the United States allegedly represented petitioner inadequately in the Globe Equity proceedings (to which petitioner was not a named party). Pet. App. 36a-47a. While observing that this Court "has twice rejected similar arguments in [analogous] cases," *id.* at 39a (citing *Nevada* v. *United States*, 463 U.S. 110, 135 (1983); *Arizona* v. *California*, 460 U.S. 605, 626, 628 n. 21 (1983)), the Arizona Supreme Court determined that it need not decide whether this case is "factually distinguishable" from those cases, because the "doctrine of comity compels" the court to "refrain from addressing the Tribe's arguments," *id.* at 40a.

The Arizona Supreme Court reasoned that "a court should not assume to disturb another court's disposition of a controversy unless there are good reasons for doing so." Pet. App. 42a (quoting Restatement § 78 cmt. a). Because petitioner intervened in the Globe Equity pro-

ceedings for purposes other than challenging the United States' representation, the court found it clear that petitioner had "consciously declined to adjudicate its 'inadequate representation' claim in the forum responsible for issuing, interpreting, and enforcing the Decree." *Id.* at 44a. Under those circumstances, the Arizona Supreme Court concluded, "[n]otions of comity would be seriously undermined if [it] were to permit the Tribe to assert [in the state court proceedings] the very arguments * * * that it has explicitly pretermitted in the federal court." *Ibid.* In any event, the court opined, the federal court likely "would not entertain an attack on the Decree * * * because of untimeliness." *Id.* at 46a.

4. In a motion for reconsideration, petitioner argued that it had sought to litigate its water rights in federal district court, but that those proceedings were stayed (under abstention grounds) by the rulings of this Court and the Ninth Circuit in *San Carlos*, *supra*, and *Adsit*, *supra*. In denying rehearing, the Arizona Supreme Court stated that the federal courts stayed only petitioner's independent federal-court action, not any post-judgment proceedings in the Globe Equity litigation, and thus did not deprive petitioner of the ability to seek relief from the Decree in the latter proceeding. Pet. App. 60a.

## ARGUMENT

This Court's review is not warranted. The Arizona Supreme Court's comity holding is wrong, but that holding does not conflict with decisions of other appellate courts, and the issue is not likely to recur frequently. Moreover, even if the comity holding were reversed, petitioner could ultimately prevail on the inadequate-representation issue it seeks to raise in these proceed-

ings only by establishing a valid defense to the res judicata effect of the Globe Equity Decree, and petitioner would have to overcome significant obstacles to do so. With respect to the conditional cross-petition, the Arizona Supreme Court's interpretation of the Globe Equity Decree is correct and does not conflict with any other appellate decisions.

1. Although the Arizona Supreme Court's decision is interlocutory, this Court has jurisdiction to consider the petition under 28 U.S.C. 1257(a) because "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). The state supreme court conclusively determined that "the Globe Equity Decree precludes the Apache Tribe and the United States on the Tribe's behalf from asserting claims to water from the mainstem of the Gila River beyond those rights granted in the Decree," and that, on grounds of comity, it would not address the Tribe's argument that the Decree should not be given preclusive effect. Pet. App. 52a. Thus, while the state courts will undertake further proceedings concerning other claims to the relevant waters, the Arizona Supreme Court finally decided petitioner's claims to the mainstem.

Moreover, a general stream adjudication is a paradigmatic case for application of the *Cox Broadcasting* rule quoted above, because a state court can spend decades resolving thousands of different claims to water rights along a particular water body. This case has been pending for over two decades. See pp. 4-5, *supra*. It would make little sense for this Court to defer review of one claim or issue until all others are resolved, potentially several decades later. That course could prejudice

*all* parties to the adjudication if this Court ultimately upset decades of litigation by overturning an initial determination.

Jurisdiction over the conditional cross-petition is a closer question. While the Arizona Supreme Court finally determined that res judicata does not bar petitioner's claims to tributaries of the Gila River, see Pet. App. 52a, further litigation will be necessary to determine which, if any, of those claims are valid. Nonetheless, this Court has jurisdiction under 28 U.S.C. 1257(a) over the narrow category of cases where "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds," and "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-483.

If this Court were to grant the petition, and were to consider the conditional cross-petition worthy of its review, it would make little sense to resolve only one of the two res judicata issues at this time, and require the parties and the state courts to undertake lengthy litigation of the tributary claims before learning whether, in this Court's view, those claims are precluded by res judicata. Especially because this Court would already be reviewing this case at this time, and general stream adjudications can be exceptionally lengthy, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" while also reducing the disruption to state proceedings—if the petition and conditional cross-petition otherwise warranted this Court's review. *Cox*, 420 U.S. at 477-478 (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).

2. Under this Court's demanding certiorari criteria, however, the petition and cross-petition do not warrant further review. Petitioner does not challenge the Arizona Supreme Court's ruling that the Globe Equity Decree adjudicated petitioner's rights to water from the Gila River mainstem. Rather, petitioner asks (Pet. 16-30) this Court to review the Arizona Supreme Court's decision not to consider its inadequate-representation defense to claim preclusion.

a. Petitioner correctly explains (Pet. 16-23) that the Arizona Supreme Court erred in declining to consider petitioner's defense based on principles of comity. In other contexts, a state court's decision to defer to a federal court on the effect of the federal court's prior judgment might be appropriate, or at least not contrary to *federal* law.

In this unusual context, however, this Court directed the federal courts to abstain from adjudicating water rights covered by the State's general stream adjudication. See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 565-570 & n. 21 (1983). This Court explained that "concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property.'" *Id.* at 567 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 819 (1976)). In doing so, the Court emphasized that the Arizona courts had a "solemn obligation to follow federal law" in adjudicating petitioner's water rights. *Id.* at 571. As part of that adjudication, the Arizona courts could properly resolve the question whether petitioner has a valid federal-law ground for overcoming the res judicata defense raised by other parties in this general stream adjudication. It makes little sense for the state

courts to decline to consider an issue of federal law out of comity to the federal courts when the federal courts have already abstained in deference to the state courts—especially when this Court has so directed and emphasized the state courts' obligation to follow federal law.

Although the Arizona Supreme Court suggested that Federal Rule of Civil Procedure 60(b) might prevent it from reaching the inadequate-representation question, the court correctly declined to rely on that ground. Pet. App. 41a-42a. Rule 60 provides a mechanism for a party to seek relief from a federal-court judgment by motion in the original proceeding, but "does not limit the power of a court to entertain an independent action to relieve a party from a judgment." Fed. R. Civ. P. 60(b). Here, petitioner seeks to assert water rights in this "independent action" by asserting affirmative claims to water, and it is asserting an inadequate-representation ground for overcoming the res judicata defense advanced by other parties.

The Arizona Supreme Court noted that the federal court that issued the Globe Equity Decree retained jurisdiction over the Decree, and petitioner intervened in that action in 1990 for purposes other than challenging the adequacy of the United States' representation. Pet. App. 44a. By that time, however, this Court had already held, in 1983, that the federal courts should abstain from adjudicating the water rights at issue in this Arizona general stream adjudication, *San Carlos*, 463 U.S. at 569-570, and the Ninth Circuit had therefore stayed petitioner's independent federal-court action, *Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187, 1189 (1983). While petitioner was free to defend its *existing* rights under the Globe Equity Decree in the court that entered

the Decree, this Court's *San Carlos* decision permitted petitioner to claim *additional* rights only in this state-court litigation. The Arizona Supreme Court therefore erred in holding that petitioner had voluntarily "declined to adjudicate its 'inadequate representation' claim" in the Globe Equity court. Pet. App. 44a.

The cases cited by the Arizona Supreme Court are not to the contrary. See Pet. App. 42a-43a. All of those cases conditioned their comity holdings on the availability of relief in an alternative forum. See *Feller* v. *Brock*, 802 F.2d 722, 728 (4th Cir. 1986); *Treadaway* v. *Academy of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1421 (9th Cir. 1986); *Lapin* v. *Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir.), cert. denied, 379 U.S. 904 (1964). Here, in contrast, relief is not available to petitioner in federal court under this Court's *San Carlos* decision.

b. Nonetheless, this case does not warrant this Court's review. The Arizona Supreme Court's decision does not directly conflict with this Court's decision in *San Carlos* because the latter decision did not address the question whether petitioner could request the federal court in the Globe Equity proceedings to determine the effect of its own prior decree for purposes of deciding whether petitioner then would be free under federal law to seek additional water from the mainstem of the Gila River in the state proceedings. Indeed, the *San Carlos* Court had no occasion to determine the significance of petitioner's *subsequent* limited intervention in the Globe Equity proceedings seven years after this Court decided *San Carlos*. Nor does petitioner contend that the decision below is in conflict with any other decision of this Court or another appellate court.

The precedential significance of the Arizona Supreme Court's decision is also limited. The issue ulti-

mately turns on this Court's decision that the federal courts should defer to Arizona's general stream adjudication—a "virtually unique" context, as this Court noted in *San Carlos*. 463 U.S. at 571.

c. The Arizona Supreme Court's comity holding may lack practical significance even in this case. Absent comity, petitioner's inadequate representation defense would face substantial obstacles on its merits. At the outset, the Arizona Supreme Court questioned the timeliness of any attempt to assert inadequate representation concerning the Globe Equity Decree many years after its entry in 1935. Pet. App. 45a-47a.

The Arizona Supreme Court also observed that this Court, in analogous cases, has twice rejected res judicata arguments similar to the argument made by petitioner in this case. Pet. App. 39a-40a (citing *Nevada* v. *United States*, 463 U.S. 110, 135 (1983); *Arizona* v. *California*, 460 U.S. 605, 626, 628 n.21 (1983) (*Arizona II*)). In *Nevada*, a Tribe sought to raise water rights claims that the United States had not sought on the Tribe's behalf when negotiating a consent decree on behalf of the Tribe and others. See 463 U.S. at 140. In holding that res judicata barred such claims, this Court emphasized that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." *Id.* at 135 (quoting *Heckman* v. *United States*, 224 U.S. 413 (1912)).

While petitioner argues (Pet. 23 n.32) that an inadequate-representation theory was not raised in *Nevada*, this Court rejected a closely related argument that the United States had labored under a conflict of interest that in turn had led it to claim less water for the Tribe

than it should have in its capacity as a fiduciary. *Nevada*, 463 U.S. at 127-128, 135-136 n.15. Moreover, petitioner relies (Pet. 23 & n.31) on an exception to res judicata that applies where "no justifiable reliance interest" was created on the part of an opposing party because a fiduciary colluded with the opposing party or the fiduciary's representation was "so grossly deficient as to be apparent to the opposing party." Restatement § 42 cmt. f. There is a serious question whether that theory could ever apply where, as here, the United States as sovereign settled a claim for Indian water rights. Even in circumstances where reliance on a *private party's* inadequate representation would be unjustifiable, reliance on the *United States'* sovereign actions presents a different question. Cf. *Nevada*, 463 U.S. at 128, 135, 136 n.15.

As a factual matter, moreover, the United States does not believe that its representation was inadequate in the Globe Equity proceedings in light of, *inter alia*, the Decree's limitation to the Gila River mainstem, the limited amount of land on the San Carlos Apache Reservation that could be readily irrigated from the mainstem, and petitioner's limited historical use of the mainstem for irrigation. See, *e.g.*, OSM No. 17817, at 44-45 (1915 report noting limited amount of Apache land in irrigation along mainstem and that such fields would be inundated by San Carlos reservior); OSM No. 200362, at 18-19 (noting that the Gila River within Apache territory was "unsuitable for traditional Apache agriculture along most of [its] course" due to topography, vegetation, and flooding, and that the Apaches "located most of their farms along permanent streams that fed into the * * * Gila * * * River[]"). Those facts would have been known to the opposing parties at the time the Decree was entered. On this basis as well, there is substantial

reason to question whether petitioner could prevail even if this Court were to reverse the Arizona court's comity holding.

3. Even if this Court were to grant the principal petition, there would be no reason to grant the conditional cross-petition, which raises (Cross-Pet. i) the factbound question whether the Arizona Supreme Court erred by interpreting the Globe Equity Decree to resolve only claims to the Gila River itself, as opposed to that river's tributaries. Cross-petitioner argues (*id.* at 17) that "[t]he Arizona Supreme Court misapplied the federal law of claim preclusion." Under this Court's Rules, however, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. There is no reason for a different result in this case, especially because the Arizona Supreme Court's decision is correct and does not conflict with any other appellate decisions.

a. Cross-petitioner argues (Cross-Pet. 21) that federal law requires "an express and clear" reservation in a consent decree for parties to "split" or reserve a claim. The Restatement states, however, that preclusion does not apply when "[t]he parties have agreed in terms *or in effect* that [a] plaintiff may split [a] claim." Restatement § 26(1)(a) (emphasis added). Thus, while an express and clear reservation of rights in a consent decree is *sufficient* to avoid res judicata, it is not invariably *necessary*. See Pet. App. 17a-18a; *Dodd* v. *Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (holding that "consent or tacit agreement" can provide "justification for splitting a claim").

The cases cited by cross-petitioner (Cross-Pet. 22-24) do not undermine that conclusion. Some of those cases

expressly recognize that a reservation need not be express. See *Simmons* v. *New Pub. Sch. Dist. No. 8*, 251 F.3d 1210, 1214 (8th Cir. 2001) (quoting Restatement § 26(1)(a)); *Young-Henderson* v. *Spartanburg Area Mental Health Ctr.*, 945 F.2d 770, 774 (4th Cir. 1991). Others rely, for example, on an agreement's "absolute[] silen[ce]." *May* v. *Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1010 (10th Cir. 1990); see *International Union* v. *Karr*, 994 F.2d 1426, 1432 (9th Cir. 1993).

Here, in contrast, the Arizona Supreme Court explained that the Globe Equity Decree grants rights only as to the Gila River, not the tributaries; the United States' amended complaint dropped the claims in its original complaint concerning the tributaries; and the Decree acknowledges the United States' dismissal *without prejudice* of all defendants who had claimed water solely from the tributaries, making it quite clear that such claims were not resolved in the Globe Equity case. Pet. App. 19a-23a. Thus, even if a reservation had to be made in the decree, the Arizona Supreme Court properly rested its decision on the terms of the Decree, as informed by the litigation that preceded it. See *ibid.* Cross-petitioner cites no analogous cases.[3]

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[3] Even if the parties had not intended to reserve the tributary claims, res judicata would apply only if the mainstem and tributary claims formed part of the same cause of action or transaction. See Pet. App. 12a-14a. Although the Arizona Supreme Court did not fully resolve that question, it recognized that "claims to the Gila River mainstem asserted by the United States in the Globe Equity litigation would not seem to be part of the same 'transaction' as its claim to the tributaries," in part because the mainstem and tributaries are "spatially distinct." *Id.* at 15a.

b. Cross-petitioner errs in asserting (Cross-Pet. 2, 18-19) that the Arizona Supreme Court's decision is in conflict with this Court's decisions in *Nevada* and *Arizona II*. In both cases, this Court held that the United States could not assert claims for the benefit of Indian reservations because decrees in prior proceedings purported—unlike the decree at issue here—to resolve all such claims.

The *Nevada* Court explained that "the only conclusion allowed by the record * * * is that the Government was given an opportunity to litigate the Reservation's entire water rights to the [river], *and that the Government intended to take advantage of that opportunity*." 463 U.S. at 131 (emphasis added); see *id.* at 131-134 (surveying the record). In *Arizona II*, an original case before this Court, the special master likewise determined that "[t]he claim in the [earlier] case . . . embraced the totality of water rights for the Reservation lands." 460 U.S. at 615 (citation omitted). Here, in contrast, the Arizona Supreme Court found, based on its careful consideration of the record, that the parties did *not* intend to resolve tributary claims in the Globe Equity proceedings. Pet. App. 19a-25a. That fact-bound decision is fully consistent with this Court's fact-bound decisions in *Nevada* and *Arizona II*.

c. The Arizona courts' analysis of the record, on which both the trial court and the state supreme court agreed, does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In any event, that analysis is correct.

While conceding (Cross-Pet. 7) that "the United States limited the geographic scope of the *Globe Equity* litigation," cross-petitioner argues (*id.* at 8) that the amended complaint brought "the tributaries within the

litigation's geographic scope." In defining the relevant river segment, the amended complaint refers to a segment of "the Gila River * * * after the following tributaries of the Gila River, the San Francisco River, and the San Carlos River, the San Pedro River, and the Santa Crus River, respectively, have joined, the main stream." Cross-Pet. App. 74. That language merely defines the portion of the mainstem at issue, without in any way demonstrating an intent to include tributary claims (or rights to divert from tributaries) in the adjudication. See Pet. App. 20a.

While cross-petitioner observes (Cross-Pet. 7) that the amended complaint "named additional parties," including cross-petitioner, "who diverted water only off the tributaries," those parties were dismissed from the adjudication, without prejudice, because their claims were "outside the territorial scope" of the suit and had been included "through inadvertence and mistake"—a point cross-petitioner ultimately acknowledges. *Id.* at 10. Such dismissals were expressly recognized in the Decree. Pet. Supp. App. 120-121.

Although the amended complaint's prayer for relief contained a request that the Court "determine the rights of the parties hereto to the waters of [the Gila River] and its tributaries" (Cross-Pet. App. 75), the Arizona Supreme Court correctly explained that this request must be read in conjunction with the amended complaint's request for a determination of the rights of the parties "to *divert* water from said river within the area aforesaid," *i.e.*, the defined segment of the Gila River mainstem, *ibid.* (emphasis added); see Pet. App. 20a-21a. While some water in the relevant portion of the Gila River came from tributaries, the amended com-

plaint sought adjudication only of rights to water in the river, not in the tributaries. See *id.* at 19a-21a.

Cross-petitioner also argues (Cross-Pet. 24) that the United States "had no reason to exclude the San Carlos River" from its claims if tributary claims were not otherwise included in the claims of the amended complaint. That ignores the fact that the United States expressly claimed appropriations from the San Carlos River on behalf of petitioner in its original complaint. Cross-Pet. App. 10. The exclusion of the San Carlos River in the amended complaint served only to narrow an express request in the original complaint, not to indicate the breadth of the amended complaint with respect to other tributary claims.

## CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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